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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL JAMES SMITH, Defendant and Appellant.	A121909 (Napa County Super. Ct. No. CR18770)

I.

INTRODUCTION

This is an appeal from an order following a court trial finding appellant Michael James Smith to be a sexually violent predator (SVP) as defined in the Sexually Violent Predator Act (Welf. & Inst. Code, §§ 6600 et seq.) (SVPA),[1] and committing him to the Department of Mental Health (the Department) for an indeterminate term pursuant to section 6604. On appeal, appellant contends there was insufficient evidence to support the court's finding that he has a mental disorder that makes it likely he will engage in criminal sexual conduct if released. Appellant also contends that the recently amended SVPA violates the due process, equal protection, ex post facto, and double jeopardy clauses of the state and federal constitutions. Lastly, appellant argues that because the trial court relied on evaluations performed under a protocol subsequently deemed invalid pursuant to the Administrative Procedures Act (Gov. Code, § 11340 et seq.) (APA), the

[1] All statutory references are to the Welfare and Institutions Code.

matter must be reversed and remanded for a new screening and evaluation process. We reject these arguments and affirm.

II.
FACTS AND PROCEDURAL HISTORY

In 1994, appellant was charged with 56 counts stemming from his molestation of four boys in their early teens. Records reveal appellant met all of his victims through his painting business. In each case, he "groomed" his victims by offering them employment and then befriending them, buying them gifts, taking them on trips, and inviting them into his home. After establishing a trusted relationship, he would molest the boys. For several years he was engaged in almost daily oral copulation with his victims, as well as anal intercourse with Abel T., a victim he molested over a long period of time. He introduced several of the boys to group sex. Eventually, appellant entered into a plea agreement whereby he pled guilty to a small number of counts against each of the four victims; and in exchange, the remaining 45 counts were dismissed, and appellant was sentenced to serve 21 years in state prison.

Shortly before appellant's release from prison in May 2005, he was referred by the Department of Corrections pursuant to section 6601, subdivision (b), to be evaluated by the Department to determine if he met the criteria for an SVP. Two psychiatrists designated by the director of the Department to evaluate appellant pursuant to section 6601, subdivision (c), determined appellant was not an SVP, and was not a risk to the community if he was released.

In May 2005 appellant was released from prison and placed on parole. One of the conditions of parole was that he not have contact with anyone under the age of 18 without the permission of his parole officer. While on parole, appellant was on an electronic GPS monitoring device at all times. He secured full-time employment as a parking lot attendant manager. During the same time, appellant attended a relapse prevention sexual offender treatment program three times per week. He also attended church activities as a Jehovah's Witness at least three times per week. Appellant was diligent in meeting with

his parole officer. It was undisputed that appellant was managing his life relatively well during the 14 months he was on parole.

In December 2005, with the approval of his parole officer, appellant moved to an apartment building that housed children. Appellant's next door neighbor with a common wall was a family with four children, three boys and a girl. One of the boys was J., then age 11.

In February 2006, while doing some painting for his landlord, appellant, in violation of his parole, paid J. to help him paint. J. testified that he and appellant painted without anyone else present.[2] Shortly thereafter, appellant, in violation of his parole, called J. over and gave him some candy to share with his brothers and sister. He later gave J. some soda to share. Sometime between February and April 2006, appellant, in violation of his parole, gave J. a bicycle. Last, in April 2006, in violation of his parole, appellant invited J. to his apartment to eat some pizza.

When the pizza delivery man arrived, appellant told J. to hide, and J. complied by hiding behind the door. While in the apartment, appellant held J.'s wrist while doing a magic trick.[3] Eventually, J. left the apartment because he knew his mother would be coming home from work. As he left, appellant gave J. a backpack.

In July 2006, J.'s parents learned appellant was a registered sex offender and advised appellant's parole officer that appellant had contact with J. While being detained for his parole violation, a petition to commit appellant as an SVP was filed. At the conclusion of the five-day court trial, the court found that appellant qualified as an SVP and committed appellant to the Department's custody for an indeterminate commitment. This appeal followed.

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[2] Appellant testified that two of J.'s aunts were present when they were painting.

[3] While appellant admitted inviting J. into his apartment, he denied that he directed him to stand behind the door when the pizza was delivered or that he had physical contact with him by holding his wrist. The trial court found J.'s testimony to be credible on these points.

III.

DISCUSSION

A. The commitment order is supported by substantial evidence

In order to establish appellant was an SVP, the People needed to prove that (1) he has been convicted of a qualifying sexually violent offense against at least one or more victims; (2) he has served a determinate term; (3) he has a diagnosable mental disorder; and (4) such disorder makes him a danger to the health and safety of others in that it is likely he will engage in sexually violent conduct if released. (§ 6600, subd. (a)(1) & (a)(1)(A).) Appellant concedes requirements (1) and (2) have been met—that he has been convicted of a qualifying sexual offense that meets the definition of a "sexually violent offense" and that he has served a determinate term. Appellant challenges the legal sufficiency of the evidence proving requirements (3) and (4)—that he has a diagnosable mental disorder, and that this disorder makes it likely he will engage in sexual misconduct if released.

The standard of review for examining a challenge to the sufficiency of the evidence in SVP proceedings is the same standard that is applied to criminal convictions. Based on an examination of the whole record, we must determine whether there is substantial evidence from which a trier of fact reasonably could conclude that the required elements have been proven beyond a reasonable doubt. The evidence is viewed in the light most favorable to the judgment, and all reasonable inferences are drawn in its support. (*People v. Mercer* (1999) 70 Cal.App.4th 463, 466-467 (*Mercer*).)

The SVPA defines a " 'diagnosed mental disorder' " as follows: " 'Diagnosed mental disorder' includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." (§ 6600, subd. (c).) The SVPA provision requiring that an offender be likely to engage in sexually criminal behavior if discharged in order to be classified as an SVP "includes an 'implied requirement' that the forecasted sexual violence be *predatory*, i.e., that it be ' "directed 'toward a stranger, a person of casual acquaintance with whom no substantial relationship

exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization.' " ' " (*People v. O'Shell* (2009) 172 Cal.App.4th 1296, 1304.)

Our Supreme Court in *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138 (*Hubbart)*, indicated there is no limit on the mental disorders that may serve as the basis for civil commitment under the SVPA. (*Id*. at p. 1157; see also *People v. Williams* (2003) 31 Cal.4th 757, 768 (*Williams)* ["we explained (in *Hubbart*) that 'civil commitment is permissible as long as the triggering condition consists of "a volitional impairment rendering [the person] dangerous beyond their control." [Citation.]' "].)

Both prosecution experts, Dr. Craig Updegrove and Dr. Mark Miculian, testified that appellant primarily suffers from a mental disorder known as paraphilia, based upon a sexual attraction to boys in their early teens (as opposed to prepubescent children as in the case of pedophilia). Both experts indicated that paraphilia is a chronic, lifelong condition for which there is no treatment. They believed appellant's paraphilia impaired his ability to control his sexual behavior, rendering him likely to commit future sexual offenses that would be predatory in nature.

Appellant contends that the prosecution experts relied solely on appellant's *past* criminal offenses to prove he suffers from a *current* mental disorder. The essence of appellant's argument is that because he was found not to meet the criteria for an SVP at the time of his release on parole in 2005, "the only *current* evidence being used to show 'volitional impairment' making appellant 'dangerous beyond (his) control' is appellant's nonsexual interaction with J[.]" He argues that because the evidence shows he "interacted with J[.] in an innocuous nonsexual way," the prosecution's experts must have relied exclusively upon his past sexual acting out when they opined that appellant's paraphilia affects his volitional capacity and predisposes him to commit sexual crimes.

In support of his argument, appellant relies on *Turner v. Superior Court* (2003) 105 Cal.App.4th 1046. *Turner* reasons: "A mental health professional cannot be expected to render opinions as to current status without fully evaluating background information. However, where an individual has been found not to be an SVP and a

petition is properly filed after that finding, the professional cannot rely solely on historical information. The professional must explain what has occurred in the interim to justify the conclusion the individual currently qualifies as an SVP." (*Id.* at p. 1060.) The court noted that a person's mental state "can certainly change depending on numerous factors, including the current outward symptoms of the mental disorder, the various choices the person has made in adjusting to a particular living situation, and the individual's reaction to changes in his external environment." (*Id.* at p. 1059, fn. 3.)

In accordance with *Turner*, the experts who testified that appellant met the criteria for an SVP based their opinions not only on appellant's past behavior, but also on his recent actions when he was released from custody and placed on parole. Both Dr. Miculian and Dr. Updegrove were of the opinion that appellant's conduct with J. was not innocuous, considering his well-documented predatory sexual interest in boys J.'s age and the fact that he was engaging in the same types of behaviors he had used in the past to gain his victim's trust before sexually molesting them.

In his written evaluation, Dr. Updegrove noted the "serious nature of [appellant]'s parole violation which appeared to be leading him dangerously close to a sexual reoffense." He indicated that appellant's "behavior shows a clear grooming pattern that was remarkably similar to his behavior in the past which resulted in sexual victimization. Inviting a boy in his target range of victims into his home, offering him food and substantial gifts and providing the boy a movie to watch are extremely high risk behaviors for [appellant]. He also showed a particular interest in this boy, singling him out in the neighboring family. It is alarming that this lapse occurred while [appellant] was in active sex offender treatment, while he was being electronically monitored and despite past comments to evaluators that he knew that he needed to stay away from children."

The report concludes that appellant "would not be considered to be amenable to outpatient treatment at this time. He would pose a serious and substantial risk for committing other violent sexual offenses is [*sic*] in the community, with or without treatment. Despite a lengthy prison term, substantial treatment efforts and close

community monitoring when last in the community . . . [h]e willfully ignored or could not resist his parole condition prohibiting any contact with minors."

Although appellant's expert disagreed with this assessment, the court resolved the conflict by crediting the testimony of Dr. Miculian and Dr. Updegrove in concluding appellant fit the criteria of an SVP. As the courts have recognized, it is not our role to redetermine the credibility of experts or to reweigh the strength of their conclusions. (*People v. Poe* (1999) 74 Cal.App.4th 826, 831; *Mercer*, *supra*, 70 Cal.App.4th at pp. 466-467.)

In conclusion, when considered as a whole, expert testimony that appellant suffers from paraphilia, his lengthy criminal history for numerous predatory sexual offenses against teenage boys, and his engaging in the grooming process with a new pre-teenage victim supports the finding that he is currently an SVP. Appellant's conduct with J. might be considered innocuous if not for the fact that he was under a strict no contact parole condition when it occurred, and if he did not have a well-documented predatory sexual interest in boys. Thus, we conclude the record contains substantial evidence supporting the court's finding of impaired volitional control due to mental defect or disease and that appellant posed a serious and well-founded risk of reoffending in a predatory manner.

B. Constitutional Challenges to the Amended SVPA

Appellant challenges the amended SVPA on federal and state constitutional due process, equal protection, ex post facto, and double jeopardy grounds. To provide context for appellant's claims, we summarize the salient features of the former and amended SVPA.

The SVPA took effect on January 1, 1996. (Stats.1995, ch. 763, § 3, pp. 5922-5929.) As originally enacted, the SVPA provided for the involuntary civil commitment for a two-year term of confinement and treatment of persons who were found beyond a

reasonable doubt to be an SVP (former § 6604).[4] (See *Williams, supra*, 31 Cal.4th at p. 764; *Hubbart, supra*, 19 Cal.4th at p. 1147.) The former SVPA provided that a person could be recommitted for a successive two-year term only upon the filing of a recommitment petition followed by another jury trial at which the prosecution again had to prove beyond a reasonable doubt that the person was currently an SVP. (Former §§ 6604, 6605, subds. (d), (e).)

California voters approved Proposition 83, effective November 8, 2006, an initiative measure. (See amend. notes, Deering's Ann. Welf. & Inst. Code (2010 supp.) foll. § 6604, pp. 141-142.) "Among other things, Proposition 83 'requires that SVPs be committed by the court to a state mental hospital for an undetermined period of time rather than [a] renewable two-year commitment . . . .' [Citation.]." (*Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1281.) Section 6604 of the SVPA now provides: "If the court or jury determines that the person is a sexually violent predator, the person shall be committed for an *indeterminate term* to the custody of the [Department] for appropriate treatment and confinement . . . ." (Italics added.)

Because the SVPA provides for an indeterminate term of commitment, the government no longer has to prove every two years that a person remains an SVP beyond a reasonable doubt. Instead, the SVPA, as amended, provides that the Department must examine the person's mental condition at least once a year and must report annually on whether the person remains an SVP. (§ 6605, subd. (a).) If the Department determines the person is no longer an SVP, the director of the Department must authorize the person to petition the court for an unconditional discharge. (§ 6605, subd. (b).) If, on consideration of such a petition, the court finds probable cause to believe the person is no longer an SVP, the court must order a hearing on the petition. (§ 6605, subd. (c).) At the hearing, a petitioner is entitled to a jury trial, the assistance of counsel, and the government must prove beyond a reasonable doubt that the petitioner is still an SVP.

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[4] References to "former" versions of the statutes comprising the SVPA are to the statutes as originally enacted.

(§ 6605, subd. (d).) If the government meets that burden, the person must be recommitted to the Department for an indeterminate term. If the government does not meet its burden, then the person must be unconditionally discharged. (§ 6605, subd. (e).)

Another avenue for release from confinement under the SVPA is a petition under section 6608. Under section 6608, a person committed as an SVP may petition for conditional release or unconditional discharge without the recommendation or concurrence of the director of the Department. (§ 6608, subd. (a).) The court may deny the petition without a hearing if it determines it is based on frivolous grounds. A person petitioning for release is entitled to the assistance of counsel. (*Ibid*.) In any hearing under section 6608, the petitioner has the burden to show by a preponderance of the evidence that he would not be a danger to the health and safety of others if under supervision and treatment in the community. (§ 6608, subd. (i).)

Turning to appellant's constitutional claims, we first note that the issues raised by appellant are now pending before the California Supreme Court in a number of cases, including a case recently decided by this court. (*People v. Boyle* (2008) 164 Cal.App.4th 1266 (Reardon, Acting P. J., Sepulveda, J., Rivera, J.), review granted Oct. 1, 2008, S166167 [addressing issues regarding ex post facto, double jeopardy, due process, and equal protection laws]; see also *People v. McKee* (2008) 160 Cal.App.4th 1517, review granted Jul. 9, 2008, S162823 [addressing issues regarding due process, equal protection, and the ex post facto laws]; *People v. Johnson* (2008) 162 Cal.App.4th 1263, review granted Aug. 13, 2008, S164388 [addressing issues regarding due process, ex post facto, double jeopardy, and equal protection laws]; *People v. Riffey* (2008) 163 Cal.App.4th 474, review granted Aug. 20, 2008, S164711 [addressing issues regarding due process, ex post facto, double jeopardy, and equal protection laws]; and *People v. Garcia* (2008) 165 Cal.App.4th 1120, review granted Oct. 16, 2008, S166682 [addressing issues regarding due process, double jeopardy, ex post facto, and equal protection laws].) Because these important constitutional questions have been thoroughly explored in the aforementioned cases and have been previously rejected by this court, only an abbreviated discussion is warranted here.

1. Due Process

Appellant contends that the SVPA, as amended in 2006, violates due process because it imposes an indefinite term of commitment and places the burden of proof on defendant to establish he no longer qualifies as an SVP. This contention is without merit. The high court has held that an initial civil commitment for an indefinite term does not violate due process merely because of the potential for a lengthy commitment. (See *Jones v. United States* (1983) 463 U.S. 354, 368 [statute providing for indefinite commitment of a criminal defendant acquitted by reason of insanity and requiring defendant to prove by preponderance of evidence that he is no longer insane or dangerous in order to be released does not violate due process]; see also *Kansas v. Hendricks* (1997) 521 U.S. 346, 358, 363 (*Hendricks*) [upholding Kansas Sexually Violent Predator Act, which provided for commitment until mental abnormality or personality disorder has so changed that the committed person is no longer dangerous].) An indefinite civil commitment is consistent with due process if the statute provides fair and reasonable procedures to ensure that the person is held "as long as he is both mentally ill and dangerous, but no longer." (*Foucha v. Louisiana* (1992) 504 U.S. 71, 77.)

Suffice it to say we agree that the SVPA as amended meets these constitutional standards of due process. The initial commitment hearing itself provides a significant level of due process protection because it requires a finding *beyond a reasonable doubt* that appellant had qualifying criminal conduct and is both mentally ill and dangerous. By comparison, the federal Constitution requires proof in an initial civil commitment case by the lesser standard of clear and convincing evidence. (*Addington v. Texas* (1979) 441 U.S. 418, 426-427, 431.) Moreover, the required periodic reviews of appellant's mental health status and the petition for release procedures minimize the risk of erroneous deprivation. (*People v. Force* (2009) 170 Cal.App.4th 797, review granted Apr. 15, 2009, S170831 [addressing issues regarding due process, ex post facto law, and equal protection]). In sum, the SVPA as amended satisfies due process requirements.

2. Equal Protection

To prevail on an equal protection claim, a person must first show that " 'the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' " (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) If that is shown, " '[t]he state must establish both that it has a "compelling interest" which justifies the challenged procedure and that the distinctions drawn by the procedure are necessary to further that interest.' " (*In re Smith* (2008) 42 Cal.4th 1251, 1263.)

Appellant argues at length that SVPs are similarly situated to other persons subject to civil commitments who are not subject to the same constraints and procedures as SVPs, and that the disparate treatment of SVPs is not justified by a compelling state interest. We disagree.

At least two California appellate cases have considered and rejected equal protection challenges to the SVPA. (*People v. Calderon* (2004) 124 Cal.App.4th 80, 94 [mentally disordered offenders and SVPs are not similarly situated]; *People v. Lopez* (2004) 123 Cal.App.4th 1306, 1314-1315 [same].) We agree with the cited authority.

Even if we assume that SVPs are similarly situated to MDOs, and other civil committees, we nevertheless conclude that the disparate treatment of SVPs with respect to the length of their commitments and procedures for judicial review is necessary to further a compelling state interest. As the California Supreme Court has noted with respect to the original SVPA, the law "narrowly target[ed] 'a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders [who] can be identified while they are incarcerated.' " (*Cooley v. Superior Court, supra,* 29 Cal.4th at p. 253.) Regarding the original SVPA, our Supreme Court has also stated: "The problem targeted by the Act is *acute,* and *the state interests*—protection of the public and mental health treatment—*are compelling.*" (*Hubbart, supra,* 19 Cal.4th at p. 1153, fn. 20, italics added.)

In our view, the problem sought to be ameliorated by the amended SVPA is no less acute than the problem identified by our Supreme Court in *Hubbart.* We conclude that the changes made to the original SVPA with respect to review procedures and length

of commitment term were justified by compelling state interests and that the distinctions drawn by the amendments were necessary to further those interests. Therefore, we reject defendant's equal protection claim.

3. Ex Post Facto and Double Jeopardy

Appellant contends that the current version of the sexually violent predator law no longer qualifies as a civil commitment scheme and is unconstitutional. He argues that the amended SVPA is punitive in nature and therefore violates the ex post facto and double jeopardy clauses of the state and federal constitutions.

The United States Supreme Court has rejected ex post facto challenges to both the Kansas Sexually Violent Predator Act and Alaska's sex offender registration law because these laws were civil, not criminal, and therefore not punitive. (*Hendricks, supra,* 521 U.S. at pp. 361-363, *Smith v. Doe* (2003) 538 U.S. 84, 101-102.) Similarly, a commitment under the SVPA is civil in nature and does not amount to punishment. (See *Hubbart, supra*, 19 Cal.4th at p. 1179 [SVPA did not violate constitutional proscription against ex post facto laws because SVPA does not impose punishment or implicate ex post facto concerns].) "[T]he critical factor is whether the duration of confinement is 'linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others.' " (*Id.* at p. 1176.) If it is so linked, then an indefinite commitment does not transgress ex post facto principles.

According to appellant, because Proposition 83 was intended to increase punishment of sexual offenders, the SVPA has now become punitive in purpose. However, the indeterminate term under California's SVPA is "linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others." (*Hendricks, supra,* 521 U.S. at p. 363.) This is "a legitimate nonpunitive governmental objective and has been historically so regarded." (*Ibid.*) Nothing in the legislative history suggests that Proposition 83 was intended to do anything other than make the SVPA a more effective civil scheme to protect the public from a small group of exceedingly dangerous individuals.

Appellant also asserts that the amended SVPA violates the double jeopardy clauses of the state and federal constitutions. He argues that he has already been punished for the crimes underlying his commitment as an SVP. Thus, any further punishment for these same offenses constitutes double jeopardy. Inasmuch as we have already concluded that the amended SVPA is not punitive, defendant's double jeopardy argument also fails. We conclude that the amended SVPA violates neither the ex post facto clauses nor the double jeopardy clauses of the state and federal constitutions.

C. Invalid Assessment Protocol to Conduct Appellant's Evaluations

Appellant contends that since certain provisions of the protocol used to conduct his evaluation "were determined to be an underground regulation" by the Office of Administrative Law (OAL) because they were improperly implemented, the filing of the SVP petition was improper and the court's commitment order should be set aside.

Whenever a person in the custody of the Department of Corrections (CDC) is referred to the Department for evaluation as an SVP, section 6601 of the SVPA specifies that two practicing psychiatrists or psychologists (or one of each) must evaluate the person "in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator as defined in this article." (§ 6601, subds.(c) & (d).) "If both evaluators concur that the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody, the Director of Mental Health shall forward a request for a petition for commitment under Section 6602 to the county . . . ." (§ 6601, subd. (d).) "The purpose of this evaluation is not to identify SVP's but, rather, to screen out those who are not SVP's." (*People v. Medina* (2009) 171 Cal.App.4th 805, 814 (*Medina*).)

Appellant's screening was conducted by two evaluators who presumably used the "Clinical Evaluator Handbook and Standardized Assessment Protocol (2007)" (hereafter protocol) to evaluate him. On August 15, 2008, the OAL held that portions of this protocol met the definition of a "regulation" (Gov. Code, § 11342.600), but were not

adopted in compliance with the APA.[5] "A regulation found not to have been properly adopted is termed an 'underground regulation.' ' "An underground regulation is a regulation that a court may determine to be invalid because it was not adopted in substantial compliance with the procedures of the [APA]." ' " (*Medina, supra*, 171 Cal.App.4th at pp. 813-814.) The OAL's determination in this regard is not binding on the courts, but is entitled to deference. (*Id.* at p. 814.) For the purpose of addressing appellant's argument, we assume without deciding that portions of the protocol used to screen appellant were invalid underground regulations promulgated in noncompliance with the APA.

In essence, appellant argues that because portions of the protocol used to evaluate him as an SVP were "unlawful" under the APA, his commitment as an SVP should be set aside. A similar argument was raised and rejected by Division One of this court in *Medina, supra*, 171 Cal.App.4th 805. The *Medina* court held that the defendant SVP forfeited a challenge to the validity of the assessment protocol as an underground regulation by failing to raise the issue in the trial court. In so holding, the court pointed out that the use of the invalid assessment protocol in conducting the SVPA evaluations did not deprive the trial court of fundamental jurisdiction, and Medina's jurisdictional argument did not question the court's personal or subject matter jurisdiction. (*Id.* at p. 816.) Therefore, when Medina admitted the allegations of the original petition, in effect consenting to entry of the commitment order, he forfeited a later challenge to that entry as an act in excess of the court's jurisdiction. (*Id*. at pp. 817-818.)

In *Medina*, unlike this case, the question of jurisdiction arose in the context of a collateral attack on the original judgment committing Medina as an SVP, and thus involved the application of rules of appellate review that are not implicated here.

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[5] On July 30, 2009, this court took judicial notice of both the protocol promulgated by the Department, and the OAL's 2008 decision concluding that certain provisions of the protocol meet the definition of a "regulation" as defined in Government Code section 11342.600, and therefore should have been adopted pursuant to the APA. (Reardon, Acting P. J.)

Nevertheless, the court's discussion is equally germane. Appellant's jurisdictional challenge likewise does not call into question the court's personal or subject matter jurisdiction, but only an act alleged to be in excess of the court's jurisdiction, which may be waived. Here, appellant forfeited his challenge to the validity of the evaluations by failing to challenge their validity in the trial court.

In addition, appellant has not shown that he was prejudiced by the use of a non-APA-compliant protocol in the screening process for SVP consideration. It is true that if the evaluations do not screen out a person under consideration as an SVP, they lead directly to a probable cause hearing at which the evaluators' opinions, as revealed in their evaluations, play a significant role. (§ 6601, subds.(c) & (d); *Cooley v. Superior Court*, *supra,* 29 Cal.4th 228, 247.) Nevertheless, "the probable cause hearing in a[n] SVP proceeding is analogous to a preliminary hearing in a criminal case. Under the rule of *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529, which has been regularly applied in SVPA appeals [citations], irregularities in a preliminary hearing require reversal only if a defendant can demonstrate that he or she was deprived of a fair trial or otherwise suffered prejudice." (*Medina, supra,* 171 Cal.App.4th at pp. 818-819.)

Moreover, a showing of prejudice is required by Article VI, section 13, of the California Constitution, which provides that a judgment cannot be set aside "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (See *People v. Breverman* (1998) 19 Cal.4th 142, 173.) Here, no prejudice is shown. The 2008 OAL determination did not suggest that the assessment protocol was flawed or unreliable as an instrument for assessing whether a person might be an SVP. Thus, appellant has not shown that dismissal of the petition on the grounds that the protocol was not APA-compliant would have resulted in an abandonment of the SVP commitment proceedings. Nor has he shown that if he had been evaluated under an APA-compliant protocol, there is a reasonable probability that he would have been found not to be an

SVP. Therefore, we reject appellant's belated challenge to the evaluations or the screening procedure.[6]

IV.

DISPOSITION

The judgment is affirmed.

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Ruvolo, P. J.

We concur:

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Reardon, J.

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Rivera, J.

[6] For the same reason, appellant's claim that his trial counsel was ineffective for not challenging the evaluations in the trial court also fails. (*Strickland v. Washington* (1984) 466 U.S. 668 ["If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Id.* at p. 697; accord, *In re Fields* (1990) 51 Cal.3d 1063, 1079)].)